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FILE
SEP 5
JOHN T. FEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 386

JOHN J. DOYLE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, John J. Doyle, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered on April 15, 1955, and is not reported but appears in the Record filed with and certified by the Clerk of the Court of Appeals below, and transmitted herewith at Page 952 of the Transcript of Proceedings.

The Opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment, was filed May 23, 1956, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the Record.

JURISDICTION.

On August 6, 1956, it was ordered that the Petition for Rehearing be denied (the Orders of the Court of Appeals appear in the Appendix to this Petition). This petition is filed within 30 days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Where the elements of the offense charged in each Count of the indictment constitute no more than a misdemeanor in violation of Section 3616(a) of Title 26 (*Berra* v. *U. S.*, 351 U.S. 131), did the trial Court err in imposing a sentence in excess of one year imprisonment, and $1000 fine, the punishment fixed by Congress for such misdemeanor?

2. Did the Court of Appeals below err in denying a request to remand to the District Court for sentence in accordance with the charge in each Count of the

indictment, and the punishment fixed therefor in Section 3616(a) of Title 26, U.S.C., by Congress, on the ground that the excessive sentence imposed was not attacked in the trial Court, or until Petition for Rehearing in the Court of Appeals and, therefore, came too late, and was not plain error affecting substantial rights?

3. Was it abuse of discretion amounting to reversible error, in an income tax evasion prosecution to deny to the defendant all details of information concerning the method of computation of the additional income alleged in the indictment, and to deny in all respects a proper and timely application for particulars, before trial, where a showing was made that such information was necessary for adequate preparation of accounting matters of defense, and the conviction is based on proof of deficiencies by use of what the Government calls the "bank deposit" and "net worth" methods of computation of unreported income?

4. Did the Court of Appeals below err in sustaining the conviction so secured, on the ground that disclosure of facts concerning methods of computation would be disclosure of theory of law upon which the Government expected to proceed, where the record shows prejudice to the defendant through lack of time to sufficiently acquaint himself with voluminous detailed computations admitted into evidence against him?

5. Was it plain reversible error to submit to the jury, without any instructions, guarding or otherwise, complicated accounting charts prepared by a Government witness for the purpose of the trial, and including a summary of the items of evidence relied

upon by the Government to support calculations of deficiency in reported income under the net worth method and the bank deposit method, in a case where principal items such as cash on hand at the opening and close of taxable periods involved, were in serious dispute?

6. Was it reversible error to refuse an adequate and proper instruction offered on the subject of evidence of the defendant's prior good reputation, and to substitute therefor an erroneous instruction, R. 920, which, in part, commanded the jury "You cannot acquit him merely because you may believe he has been a person of good repute", which destroyed any benefit that may have accrued to the defendant from the evidence of prior good reputation, and from any prior language in the instruction, and could reasonably be considered as having misled the jury into ignoring the defendant's evidence in this regard?

7. Did the prosecutors' persistent efforts resulting in directing the jury's attention to prejudicial irrelevant matters, and the arguments to the jury thereon, deprive the defendant of a fair trial, and thus result in plain reversible error, where the defendant was charged in the arguments with corruption of law enforcement officers, and association with juvenile delinquency, and with OPA violations, none of which matters was supported by the evidence or related to the charge in the indictment?

STATEMENT OF THE CASE.

The petitioner, John J. Doyle, was convicted on two Counts of an indictment charging violation of the Internal Revenue laws, one Count charging a violation with respect to the year 1947 and the second Count charging a viola-

tion with respect to the year 1948. Each Count charged that the petitioner attempted to evade and defeat a large part of the income tax due and owing by him and his wife to the United States for the respective year by filing a false return for each year. The claimed understatements of income tax were approximately $21,000.00 for the calendar year 1947 and approximately $18,000.00 for the calendar year 1948 (R. 2-3).

The petitioner filed a timely motion for a bill of particulars (R. 6), supported by memorandum, and by the affidavit of his accountant concerning the necessity therefor (R. 9). With regard to each Count, the motion requested the following:

1. The method by which "joint net income" for the calendar year 1947 is determined, by setting forth the gross income alleged to have been received by defendant and his wife, and the amount of deductions and credits allowed in arriving at the alleged "joint net income."

2. The source or sources of the "joint net income" charged to have been received by defendant and his wife during the calendar year (1947), with the amounts asserted to have been received from each source.

3. The nature and amount of deductions or credits, if any, claimed on the return under Indictment which were disallowed in arriving at the alleged "joint net income" for the calendar year (1947).

4. The method used in reconstructing the income of the defendant and his wife for the calendar year 1947. (R. 6).

This motion for particulars was denied in all respects (R. 10), and the petitioner was refused all information regarding the details mentioned until the evidence was pre-

sented against him during the trial (R. 18, 19, 446-449, 490, 492, 634, 635).

The trial was a jury trial before the Honorable Cale J. Holder, Judge of the District Court for the Southern District of Indiana, and extended from January 11 to January 29, 1955. After a verdict of guilty on both Counts the petitioner was sentenced to a term of two years' imprisonment and a fine of $10,000.00 on Count 1 and sentenced to a term of two years' imprisonment on Count 2, the sentences to be served concurrently (R. 952-953).

On May 23, 1956, the United States Court of Appeals for the Seventh Circuit filed its opinion and entered judgment affirming the conviction (see Appendix). A petition for rehearing was filed and while that petition for rehearing was under consideration by the Court of Appeals, the petitioner filed an emergency motion for leave to file additional petition for rehearing on June 15, 1956. This petition cited the decision of the Supreme Court in *Berra* v. *United States,* 351 U.S. 131. This motion and petition directed the attention of the Court to the fact that the indictment, in each count, alleged no more than a misdemeanor in violation of Section 3616(a) of Title 26, U.S.C., whereas the petitioner had been sentenced in excess of the punishment fixed by law in that Section, under the conception that the violation charged in the indictment was a violation of Section 145(b), Title 26, U.S.C. The motion requested reversal and remand, or in the alternative, a remand to the District Court for the purpose of entertaining a motion under Rule 35 of the Federal Rules of Criminal Procedure to correct an illegal sentence. It was suggested that after the District Court had acted upon said motion, the action thereon be certified to the Court of Appeals and that then the Court of Appeals make its final determination of the matter, and it was

further suggested that such a procedure would preclude a multiplicity of actions and appeals and would permit the earliest final disposition of the matter, with full and proper consideration by all Courts concerned.

The United States opposed this motion in an answer and brief which are included in the certified record filed herewith by the Clerk of the Court of Appeals.

On August 6, 1956, the United States Court of Appeals for the Seventh Circuit denied the petition for rehearing, and further ordered that the motion for leave to file additional petition for rehearing challenging the validity of the sentence imposed upon him be denied for the reasons stated in its opinion in *United States* v. *Achilli,* No. 11575 decided July 31, 1956 (see Appendix). A copy of the opinion in *United States* v. *Achilli,* No. 11575, United States Court of Appeals for the Seventh Circuit, dated July 31, 1956, has, therefore, been appended to this brief and is included in the record certified by the Clerk of the Court of Appeals.

THE EVIDENCE.

John J. Doyle, during the years in question, was married and a resident of Gary, Indiana (R. 716). During the years 1947 and 1948, he derived his reported income and losses from the Calumet News Company, a racing wire service and bookmaking partnership, The Calumet Novelty Company, a partnership operating and maintaining slot machines, and the 442 Club, a bookmaking partnership, all in the City of Gary, Indiana (R. 26-39, Gov. Ex. 1-8). The recording of daily receipts and disbursements from each partnership was made by the witness Crawford (R. 813) from daily reports, which were burned in 1950 (R. 785), and transmitted to the witness Slay (R. 501) who prepared the books and records of each partnership (R.

489-502). The witness Slay prepared returns for each partnership as well as the individual returns of the defendant for the years 1947 and 1948 (R. 498-499). The income reported on the defendant's returns corresponded to the income distributable to the defendant as disclosed on the partnership returns (R. 72), and the income of each partnership as shown on its returns corresponded to the income disclosed on the books of each partnership (R. 586).

The Calumet News Company began in 1945 as a partnership composed of the defendant, Irving Kirsch, Jesse Roberts and Jack W. Stone (R. 778). From the beginning of 1946 until June 14, 1947, the partnership consisted of the defendant, Irving Kirsch and Jesse Roberts, and after that date until the end of 1948 it was a partnership between the defendant and Irving Kirsch alone (R. 385). Up until June 14, 1947, the partnership supplied racing information to a number of bookmaking establishments, handled the recordation of betting and wins and losses through an employee stationed in the establishment, and divided the total winnings with the owners of the establishments, generally on an equal basis (R. 389). After that date, the partnership merely supplied racing information to others for a fixed fee, variable with the size of the location (R. 390). In 1948, the partnership began taking its own bets at one location, an operation responsible for approximately 90% of its profit in that year (R. 403).

The Calumet Novelty Company began in 1946, and remained an equal partnership between the defendant and the witness Crawford during the years in question (R. 43, 47, Gov. Exs. 7, 8). The business was conducted by furnishing slot machines to various locations together with a "load" for paying winners (R. 727), in return for a division of the winnings. The number of such locations

gradually increased during the years involved from 17 to 85 locations (R. 400-401). Some of the machines operated by the partnership were confiscated by the police in both 1947 and 1948 (R. 42, 45, Gov. Exs. 7, 8, R. 788-9).

The 442 Club reported as a partnership composed of the defendant, John A. Ellis, and Paul G. and Donald M. Dacey. The partnership began in 1943 and underwent several changes of partners prior to 1947 (R. 765). The partnership's bookmaking business was closed April 11, 1947, and did not reopen (R. 397).

In May, 1947, the defendant gave the witness O'Donnell $5,000 for the purpose of investment with the witness Jackson in a restaurant and bar known as Jackson's Restaurant (R. 83, 729). Both the defendant (R. 729) and the witness O'Donnell (R. 83) testified that the money given O'Donnell was a loan. Thereafter the defendant gave O'Donnell approximately another $15,000 in cash and checks for investment in the restaurant (R. 857-59). Checks of the defendant were also used to pay part of the purchase price of an air conditioner in the summer of 1948 (R. 355). Jackson and O'Donnell both actively worked in the business (R. 644, 651-652) and both were the only persons authorized to sign checks on the partnership account (R. 657).

The distributable income attributed to O'Donnell in the partnership returns in 1947 was $1467.59 (R. 86), and in 1948 was about $4000.00. O'Donnell, during these years, drew money out of the register when he wanted to, and estimated the total amount withdrawn in both years did not exceed $6000 (R. 87). In October, 1948, the defendant and O'Donnell had a conversation in which O'Donnell testified that the defendant offered to take over O'Donnell's interest in the business, incorporate it, and give O'Donnell

stock in the business (R. 91). The defendant testified that O'Donnell volunteered to turn over his interest in the partnership to him, effective Jan. 1, 1949 (R. 730). An assignment of the interest was made on the bottom of a copy of a partnership agreement between Jackson and O'Donnell (Def. Ex. B).

In November 1948 Jackson and the defendant opened a bank account in the name of Jackson's Restaurant, Inc. (R. 685). No receipts from the operation of the restaurant were put into this account during 1948 (R. 686). The only funds in the account in 1948 were put in by the defendant (R. 677-8, 686, 732), and the funds were used to purchase real estate adjoining Jackson's Restaurant (R. 108, Def. Ex. C, 225 Def. Ex. H, 246) or for earnest money on the restaurant property itself (R. 209). The acquisition of the Walsh property involved payment of the balance due on a contract entered into in June, 1947 by Jackson (R. 172-174 Def. Ex. E). Jackson's Restaurant was incorporated on December 1, 1948 (R. 276, Def. Ex. I). Ten shares were originally issued to Paul Jackson, nine shares to Veronica Lucas, and one share to Blaz Lucas (R. 271). Lucas was the defendant's attorney (R. 731), and Veronica Lucas was Lucas' wife (R. 274). On January 7, 1949, the shares of Veronica Lucas were transferred to the defendant (R. 272). The witness O'Donnell was put on the payroll beginning in January 1949 at approximately $80 a week after taxes (R. 92-93, 682), and remained in the employ of the restaurant until March of that year. O'Donnell testified he was called in to the back room of the restaurant on January 19, 1949 and told by the witness Slay that his income tax return was prepared and ready for him to sign. The defendant was present and told him that the restaurant had made about $21,000 in 1948 but that the money had been put back in the busi-

ness and there was insufficient cash to pay O'Donnell's taxes (R. 88). He offered to pay O'Donnell's taxes for the year, which he did by personal check marked "Account of John O'Donnell" (Gov. Ex. 10-A). Substantially the same version of the conversation was related by the witness Slay, except that Slay stated that O'Donnell was present when the return was prepared, other than the Schedule D (R. 514).

A bartender (R. 643) and a waitress (R. 650) employed by Jackson's Restaurant during the indictment years, testified that O'Donnell was present and took an active part in the management of the restaurant during the years in question, that they had not seen the defendant around the restaurant during this period, and had not known the defendant as an owner until 1949.

The witness Schreiber testified that the defendant told him on April 26, 1951, that he had been in partnership with Jackson in the restaurant for about four years, but that he had put his interest in the name of O'Donnell to protect the restaurant's liquor license (R. 310). Schreiber further testified that on Jure 13, 1951, he had a conversation with the defendant in which Schreiber asked the defendant about a statemen: allegedly made to other revenue agents that the defendant bought out O'Donnell's interest in the restaurant at the end of 1948. Schreiber testified that he asked him how this could be true if the defendant had paid O'Donnell's taxes for 1948, and that the defendant became very angry and admitted again that O'Donnell's interest in the restaurant was really his (R. 414-415). The substance of both conversations was denied by the defendant (R. 754-755). The witness Johnson, a revenue agent, corroborated Schreiber's version of both conversations (R. 830-831). The defendant could not remember whether he had testified before a grand jury

in Crown Point, Indiana, on January 16, 1951, to the effect that he had been a partner in Jackson's Restaurant for 4½ years (R. 810). The witness Burns, the secretary of that grand jury, testified that that answer had been given (R. 837).

Various witnesses were called to establish the existence of assets of the defendant on December 31, 1946, December 31, 1947, and December 31, 1948 (R. 101, 103, 107, 111, 114, 126, 170, 181, 184, 198, 199, 206, 207, 218, 220, 223, 226, 229, 243, 245, 277, 280, 287, 367), or to testify to expenditures from the defendant's back accounts and otherwise during the years 1947 to 1948 (R. 157, 166, 176, 188, 191, 200, 232, 248). The items about which each of these witnesses testified appear in and comprise Government's Exhibits 103 and 108 (Appendix A to Brief), with the exception of the figures for cash on hand and the estimate of living expenses of the defendant as they appear in those exhibits.

The defendant maintained joint checking accounts with his wife at two banks during most of the period in question (R. 116, 127). The defendant or his wife also had access to three safety deposit boxes, one jointly with his wife referred to as Box #475 (R. 141), one jointly with the witness Crawford, known as Box #A-2738 (R. 146), and one in the name of his wife and one Amelia Ludwig, known as Box D-899 (R. 147). The record of entries in each box disclosed that Box 475 was entered by the defendant alone at regular intervals from January through early November, 1947, August through November, 1948, and on January 4 and 5, 1949 (R. 145). Box A-2738, opened April 7, 1947 (R. 146), was entered regularly by Crawford alone during 1947 and until November 1948. Further entries to the end of the year were made by the

defendant (R. 149-152). All entries to Box D-899 were made by the defendant's wife (R. 154). Schreiber testified that the defendant told him that daily collections were put in the safety deposit boxes and taken out for deposit in the bank only when needed (R. 375). A comparison of entries to safety deposit boxes with bank deposits disclosed there were only 17 days in 1947 on which currency deposits were made (R. 441, Gov. Ex. 102) and two days in that year on which deposits were made without safety deposit entries (R. 441-442). In 1948 there were 23 days on which currency deposits were made, 11 appearing on days on which there were no entries to safety deposit boxes (R. 445). The witness Crawford testified that the cash receipts of the Calumet Novelty Company and Calumet News Company were intermingled in a safe at their place of business in Gary and taken from there to the safety deposit boxes (R. 819).

Schreiber testified that in a conversation with the defendant on July 30, 1952, the witness asked the defendant about two currency deposits made by him on January 5, 1949, in a total amount of $50,000 and that the defendant replied that money could not have represented 1949 income but must have been income earned in 1948. The witness asserted that he further admitted that as a general rule, all deposits in the first 15 days of any year represented income earned in the prior year (R. 425). The defendant denied that he had stated the money was income earned in 1948 or in any other year (R. 807). There was no other evidence of the defendant's income in the first 15 days of 1949 as disclosed by his books and records of any other source (R. 460), although the witness testified that he had asked for (R. 296) and received (R. 311) all of the defendant's books and records in 1951.

The witness Schreiber in preparing Government Exhibits 103 and 108, estimated the defendant's cash on hand

on December 31, 1946 to be $24,758, the amount of the defendant's bank deposits from January 1 to January 15, 1947 (R. 461, 539). By use of this figure, the defendant's net worth at the close of 1946 was made to appear to be approximately $79,000 (R. 551). Reconstruction of the defendant's income from 1941, the first year after 1920 in which the Government had a record of his having paid tax (Gov. Exs. 13, 101-A, 101-B), to 1946, indicated a total taxable income during the period of $184,430.19 of which approximately $170,000 was reported in 1945 and 1946 (R. 753, 801, Def. Exs. O, P). From this total the witness Schreiber deducted income taxes paid in the amount of $63,417.15, nondeductible gifts in the amount of $7000 and living expenses equal to net income after taxes in 1941 and 1942, $5500 per year for 1943 and 1944, $8000 for 1945, and $10,000 for 1946, to arrive at a net available for net worth at the close of 1946 of $79,629.54 (R. 530).

In his testimony the defendant estimated that his cash on hand at the close of 1946 was not less than $50,000 (R. 754), and could have been as high as $70,000 (R. 811).

Schreiber testified that the defendant estimated that his living expenses were not more than $10,000 a year (R. 423), but that an itemized estimate given by the defendant totaled in excess of $13,000 for 1947, and in excess of $12,000 for 1948 (R. 479). There was no evidence of the defendant's living expenses for any other year, except the testimony of the defendant (R. 736-738, 801, 803), and his wife (R. 710, 711, 715). The defendant admitted that neither he nor his immediate family had received any gifts or inheritances during or prior to the years in question (R. 807).

Three witnesses, a banker (R. 659), a funeral director and former O.P.A. Chairman and charity drive leader,

(R. 665), and the President of the Indiana State Bar Association and former member of the State Bar Examiners (R. 744) testified that the defendant's reputation for truth and veracity, honesty and integrity, and as a law abiding citizen was good.

REASONS FOR GRANTING WRIT.

This case presents an important question of federal law which has not been, but should be settled by this Court, that is, the validity of a sentence imposed upon conviction under an indictment which alleges facts which constitute a misdemeanor under Section 3616(a) of Title 26, U.S.C., where the sentence is in excess of the punishment authorized by Congress for such violation. This contention by the petitioner is based upon the recent decision of the Supreme Court in *Berra* v. *United States,* 351 U.S. 131, where it was held that an indictment similar in all principal respects to the one in the case at bar was indicated as being one which charged a misdemeanor under Section 3616(a) rather than a felony under Section 145(b), both of Title 26, U.S.C. In that case this Court held that the validity of the sentence had not been questioned and was not there considered. In the case at bar the petitioner now seeks to have the validity of the sentence determined by this Court.

The Court of Appeals below has decided a federal question involving the conduct of trials and procedural safeguards of substantial rights of defendants in income tax prosecutions in a way which is in conflict with applicable decisions of this Court, *Holland* v. *United States,* 348 U.S. 121. The Court of Appeals below further has adopted and sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court, which calls for an exercise of this Court's supervision, by affirm-

ing a conviction where the defendant was denied all details of information concerning the method of computation of additional income alleged in the indictment, where the prosecution was based upon complicated circumstantial methods of computation called the net worth method and the bank deposit method, and was thus deprived of adequate preparation of defense, and his right to be informed of the nature and cause of the accusation against him was infringed upon.

The Court of Appeals below has rendered a decision concerning the propriety of granting a bill of particulars which, in effect, vitiates Rule 7(f) of the Federal Rules of Criminal Procedure which provides for the granting of a bill of particulars. The decision is in conflict with the decisions of other Courts of Appeals, *Singer* v. *United States,* 58 F. 2d 74, 76, (3rd Cir.).

The decision of the Court of Appeals below with respect to its approval of the instruction concerning evidence of prior good reputation is in conflict with other decisions of the same Court and, in some respects, conflicts with decisions of this Court, *United States* v. *Donnelly,* (C.A. 7) 179 F. 2d 227, 233; *United States* v. *Semeniuk,* 193 F. 2d 508, 509, 510; *Michelson* v. *United States,* 335 U.S. 469, 477.

It is further contended that the Court of Appeals below has failed to recognize plain error created by the passionate and prejudicial conduct of the prosecutors in their persistent efforts to divert the jury's attention from the issues of the case on trial to prejudicial matters which prevented a fair trial free of prejudice, and the decision is thus in conflict with the decision of the Third Circuit Court of Appeals in *United States* v. *American Die and Instrument Works,* 213 F. 2d 731, and of the Fifth Circuit Court of Appeals in *Steele* v. *United States,* 222 F. 2d 628, 631.

I.

The indictment in this case (R. 2, 3) is in the standard usual form employed in many similar cases and is in all principal respects similar to the one involved in the case of *Berra* v. *United States,* 351 U.S. 131. In that case this Court held that the allegations of such an indictment constituted a charge of a misdemeanor under Section 3616(a), Title 26, U.S.C. In the *Berra* case the only question presented to any Court was the propriety of an instruction submitting the construction of the indictment to the jury.

The petitioner here has requested the Court of Appeals below to decide the validity of the sentence which was imposed, and which sentence was in excess of the punishment provided for by Congress in Section 3616(a), Title 26, U.S.C. The Court of Appeals below has stated in its order that it relies upon its decision in *United States* v. *Achilli,* No. 11575, entered July 31, 1956. In that decision, a copy of which is appended to this petition, the Court of Appeals has stated that it is impelled to determine that the imposition of an excessive sentence, if such was the fact, is not plain error.

The petitioner submits that this is an erroneous conclusion since the punishment in excess of that authorized by Congress is obviously an unconstitutional infringement of substantial rights and should be noticed wherever and whenever raised. It is respectfully submitted that Rule 35 of the Federal Rules of Criminal Procedure provides, in part, "The Court may correct an illegal sentence at any time." Certainly, a sentence in excess of that authorized by Congress is illegal. It is respectfully suggested that it is desirable and necessary for this Court to settle the question raised by this petitioner because it is one which is common to many suits now pending and so that prose-

cutors, defendants and trial Courts will be guarded in their disposition of cases based upon similar indictments.

The petitioner considers that the language of the opinions in the *Berra* case sufficiently demonstrates the arguments which can be made concerning the construction of the indictment in this case and the indictment in the *Berra* case.

It is respectfully suggested that if it is considered that this question of the validity of the sentence should be passed upon by the Courts below, by a motion to correct the invalid sentence, that it would be appropriate for this Court to remand the cause to the District Court for consideration of such a motion, and that this procedure would void a multiplicity of actions and appeals.

II.

The District Court in this case denied a motion for bill of particulars (R. 6, 10), which was filed in apt time under Rule 7(f) of the Federal Rules of Criminal Procedure, and was supported by a memorandum of law (R. 7, 8) and by the affidavit of an accountant stating his opinion that the information requested in the bill of particulars was necessary to the preparation of defense.

The details requested in the motion for particulars concerned the methods and factors by which the Government computed the alleged deficiency in reported income.

The petitioner recognizes that the grant or denial of a bill of particulars is a matter within the discretion of trial Courts under Rule 7(f) and the decisions of many Courts. However, it is urged that in income tax evasion cases, particularly, a defendant is entitled to more than the mere naked statement of alleged deficiencies, and errors in a filed return. This is especially so in cases

where alleged deficiencies are intended to be established by circumstantial reconstruction under complicated accounting methods.

In the case at bar, the first notice that the petitioner received of the circumstantial methods to be relied upon by the prosecutors was in the opening statement of the prosecutor (R. 18), when it was stated that the Government would rely upon the "bank deposit" method and the "net worth" method.

Thereafter during the trial, the petitioner, for the first time, was confronted with Government Exhibit 103, which was a detailed accounting sheet setting forth the Government's expert witness' accounting reconstruction of income under the bank deposit method. At this point, defense counsel requested inspection of any additional exhibits intended to be used to support the bank deposit method or the alternative net worth method, and this request was denied (R. 490-492). The following week of the trial the same witness produced Government's Exhibit 108, which was a schedule showing computation of the reconstructed income of the petitioner by net worth and expenditure method. The next day the Government rested its case (R. 634, 635).

The distress of the petitioner's trial counsel is demonstrated at pages 564 and 565 of the Record. The Record at pages 564, 565 and 771 indicates the temper and inclination of the trial Court with regard to indulgence of any request by the petitioner for adjournment, recess or continuance for the purpose of studying these complicated exhibits, and their submission for adequate examination by accounting assistance.

It is respectfully submitted that the Court of Appeals erred in holding that the Record does not show any pre-

judice to the petitioner, and it is submitted that the decision of the Court of Appeals will stand as authority for regular and automatic denial of requests for particulars which should have been granted, if the decision is not corrected by action of this Court.

The language in *Singer* v. *United States,* 58 F. 2d 74, 76, indicates the desirability of a bill of particulars in a case such as this and that decision is in conflict with the decision of the Court of Appeals in the case at bar. The opinion of the District Court in Wisconsin rendered in *United States* v. *Brodson,* 136 F. Supp. 158, 165, demonstrates the widespread common knowledge that adequate defense cannot be made in income tax evasion cases if all information concerning the methods used by the Government in reconstructing alleged unreported income is denied to the defendant, and adequate opportunity to prepare rebuttal with accounting assistance is precluded. The action of the District Court, and the opinion of the Court of Appeals are not in harmony with the spirit and sense of the opinion of this Court in *Holland* v. *United States,* 348 U.S. 121.

The Court of Appeals has stated in its opinion that the petitioner's request for particulars, in substance, constituted a request for a statement of a theory of law. The petitioner contends that this is not correct and that his motion for bill of particulars actually sought disclosure of the factoral method of accounting relied upon, and details of certain factors involved therein.

III.

Exhibit 103 (R. 449) and Exhibit 108 (R. 526), over objections, were introduced by the Government through the testimony of Agent Schreiber. These exhibits respectively are charts or schedules of figures purporting to

demonstrate the bank deposit theory and the net worth and expenditure theory of the prosecution.

These were submitted to the Jury, (in fact, twelve individual copies were distributed for the Jury's use). (R. 450, 526). No instruction concerning their weight or purpose or manner of consideration, was given to the Jury. It was the obligation of the trial Court to instruct the Jury concerning these documents and their purpose and weight. *Screws* v. *United States,* 325 U.S. 91, 107.

In the recent Holland decision, *Holland* v. *United States,* 348 U.S. 121 at pages 127 and 128, the Supreme Court said,

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

IV.

Vern Balldridge, an officer of the Gary National Bank and formerly City Controller of Gary, testified that he knew the defendant for 10 or 12 years and that defendant's reputation in the community in which he lived for honesty, integrity, truthfulness and veracity was good (R. 659). On cross-examination by the Prosecutor he testified that the defendant's reputation for being a law abiding citizen was good (R. 663).

Edward J. Burns, a licensed Funeral Director of Gary, Indiana, for 27 years, Chairman of the March of Dimes Fund Drive, and former Chairman of Red Cross Fund Drive, and Chairman of O.P.A. for 5 years, all in Gary,

testified he knew the defendant for 15 years, and that defendant's reputation in Gary for honesty, integrity, truthfulness and veracity, and as a law abiding citizen was good (R. 665-667).

William Isham, an Attorney, licensed in Indiana, since 1922, and President of the Indiana State Bar Association, and formerly a member of the Board of Law Examiners, testified that he had known the defendant since 1945, and that defendant's reputation for honesty, integrity, truth, veracity and as a law abiding citizen was good (R. 744, 745).

The Court's instructions on this subject numbered 85 and 86 appear at pages 920 and 921 of the record.

Both instructions use the word "character" rather than reputation, which is erroneous, and misleading, because the defendant, of course, was not proving his good *character* by the witnesses, but rather his good reputation.

This is expressly stated in *Michelson* v. *United States*, 335 U.S. 469, 477, where it is stated:

> "When the defendant elects to initiate a character inquiry, another anomalous rule comes into play. Not only is he permitted to call witnesses to testify from hearsay, but indeed such a witness is not allowed to base his testimony on anything but hearsay. What commonly is called 'character evidence' is only such when 'character' is employed as a synonym for 'reputation.'"

The instruction tendered by the defendant on this subject (R. 932), was refused by the trial Judge (R. 839). This was a proper instruction and its refusal was prejudicial error. *United States* v. *Donnelly*, 179 F. 2d 227, 233.

Instruction 86, (R. 920, 921) imposed on the Jury the burden of determining whether the defendant was a per-

son of "*good character*", rather than whether he bore a *good reputation* in the matters of truth and veracity, honesty and integrity and for being law abiding, among those who knew him in his community. It put upon the defendant the burden of proving he was *good,* rather than permitting the generation of reasonable doubt if the Jury found he had proved a *good reputation* among others in the respects testified about.

The statement in the instruction that "previous *good character* if shown, cannot justify, excuse, palliate or mitigate the offense, and *you cannot acquit him merely because* you may believe *he had been a person of good repute,*" is so overwhelmingly argumentative against proper consideration of the issue as to destroy any beneficial effect of the evidence.

In *United States* v. *Semeniuk*, 193 F. 2d 508 at pages 509 and 510, the Court of Appeals below said:

> "Certainly the latter portion of the charge if standing alone is erroneous. That admonition to the jury makes the use of good character evidence meaningless. It would be an empty gesture if it could not be considered by the jury and utilized in a proper case for the purpose of acquittal. The government argues, however, that the two portions of the charge when read together are in no way repugnant or conflicting. We cannot so read them. In the first portion, the jury was properly instructed relative to character testimony and was told that evidence of such 'may be sufficient to create in your minds a reasonable doubt as to the guilt of the defendant' but, subsequently, that such testimony 'should not be used by you as an excuse to acquit him in the case.' *But such evidence could be used as an excuse (we think 'reason' is a better word) for a verdict favorable to the defendant.* Certainly, if it raised a reasonable doubt of guilt it was sufficient and *the defendant was entitled to have that made clear to the jury.*" (Emphasis supplied)

"We see no point in citing or discussing the numerous cases called to our attention wherein instructions on character evidence have been considered and discussed. We have examined these cases and none of them support the giving of a charge such as here complained of. In the recent case of *United States* v. *Wicoff*, 7 Cir., 187 F. 2d 886, on page 890 this court, in referring to character evidence, stated: 'Such evidence may in itself be sufficient to create in the minds of the jury a reasonable doubt of the guilt of the defendant.'

"This is the universal rule, so far as we are aware, and it certainly is the rule in this Circuit.

"That the instruction as given was erroneous is hardly open to question. And it is reasonable to think that it was calculated to mislead the jury into ignoring defendant's evidence of good character. We think it was, or at any rate might have been prejudicial to the defendant, particularly in view of the fact that knowledge, the gist of the offense, could only be inferred from facts and circumstances in proof. As previously stated, the evidence on this essential element of the case, when viewed most favorably to the government, was close and the erroneous statement contained in the court's charge might well have produced an effect adverse to the defendant.

"The judgment is reversed and the cause remanded for a new trial."

In *United States* v. *Donnelly*, 179 F. 2d 227 at 233, the Court of Appeals below said:

"We think the instruction formally requested by the defendant should have been given. The outcome of the case depended largely upon the jury's appraisal of the credibility of Hendrixson and of the defendant. Under quite similar circumstances in *Snitkin* v. *United States*, 265 F. 489, this court held the failure to give the instruction here requested was reversible

error. See also: *Miller et al.* v. *United States,* 10 Cir., 120 F. 2d 968. In *Edgington* v. *United States,* 164 U.S. 361, at page 366, 17 S. Ct. 72, at page 73, 41 L. Ed. 467, the court said:

> 'Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although, without it, the other evidence would be convincing.' "

Other decisions of the Court of Appeals below in support of defendant's contention are *United States* v. *Wicoff,* 187 F. 2d 886, 890; and *Snitkin* v. *United States,* 265 F. 489. These cases and *Edgington* v. *United States,* 164 U.S. 361, all hold that proper instruction on this point is especially necessary where the element of fraudulent intent is involved.

The argumentative admonition that *mere* evidence of good reputation could not justify or excuse acquittal, in itself, was prejudicial and reversible error. The veracity of the defendant as a witness as opposed to Government witnesses was a crucial issue in this case, and of course fraudulent intent and dishonesty were elements necessary of proof.

V.

Throughout the trial, the Prosecutor persistently sought to introduce derogatory and irrelevant prejudicial matter. In closing argument some of these items were dwelt upon at length and with vehemence.

The business of the defendant was gambling. However incidentally harmful this may have been, there was no occasion or justification for the repeated efforts to place before the Jury implications of corruption of officials, violation of War Price regulations, friendship with enforcement officers, and other immaterial matters, *none proved by the evidence,* and unjustified argument of these implications, in an inflammatory manner. The defendant was a resident of Gary, Indiana, and under the law was tried by Jury at Indianapolis, in another Judicial District. To emphasize this could only be an appeal to local prejudice and possible antagonism against a non-resident of the community where the prosecution took place.

a. The witness Slay testified as a Government witness that he had prepared records and tax returns for the defendant and enterprises with which he was connected, from data submitted by defendant and associates (R. 499). Slay, during the time in question, was employed by the Bureau of Internal Revenue, as assistant division chief of the Gary office (R. 498).

In the course of direct examination of his own witness, the Prosecutor asked Slay if he was suspended from Government employment "effective July 16, 1951". Objection thereto was overruled (R. 502).

The Prosecutor then asked if the suspension was in connection with activities with Doyle, the defendant, or his activities. Objection was sustained (R. 502). Page 512 of the record, however, shows the Prosecutor's dissatisfaction with this ruling. He again asked Slay to state when he was suspended by the Government, and then asked, "What reason, if any, did the Bureau give for suspending you?" Objection to this obviously improper question was sustained. It is submitted that this question was asked

y for the calculated purpose of arousing conjecture the Jury on this point, to the defendant's prejudice.

At the conclusion of the direct testimony of Agent reiber, the trial judge interposed this question:

"The Court: The Court has one question before cross examination. Mr. Witness, in search of the Defendant's books and records and checks here, did you find any record of payments to the witness Mr. Slay who kept the books of the Defendant that is in evidence here?

The Witness: No, Sir, no record whatever.

The Court: And any record of payments from the partnerships in evidence here.

The Witness: No, Sir." (R. 564).

his act of advocacy by the Court, coming after com- ion of the Government's submission of its evidence the figures it considered appropriate to its theory of of, could only increase the Jury's curiosity on this levant matter, and emphasizes the probable effect on Jury.

hese matters were then argued to the Jury by Mr. itcomb, Assistant United States Attorney as follows 860):

"Another element, you will be instructed in the same instruction that an affirmative willful intent may be inferred from the nature of the book. Now these books were prepared by Mr. Slay. You know who Mr. Slay was—a fellow with a fine career ahead of him, Assistant Division Collector up in Gary, Assistant Chief of Collections—and he was corrupted by this outfit that he got connected with. He had a job that paid a fine salary and had a future—a good future—in Government service; and you saw him sit there on the stand and tell you how he would meet these people down on the street, down at the bus

station, down at 5th and Broadway, in their car somewhere, and get the records from them, and prepare the books from them; but the records he got from them were sheets of paper prepared by Mr. Crawford for that purpose, and the only purpose of these records was to have something to compare with the 1040's, the partnership returns, which you have seen. These don't prove a thing. There is Mr. Slay on all of these returns. Now, Slay was Doyle's man. On all of these partnerships Slay prepared all of the returns. This is Slay's handwriting on all of these books, and Slay just got dismissed from service, out of a job. He was corrupt, just as many things become corrupt when they are associated with this sort of an operation—law enforcement officers, political officers and juvenile delinquency, all tied in together."

b. The evidence showed purchase by defendant of several automobiles in the years in question. This was treated in argument to the Jury, by Mr. Brown, United States Attorney, as follows:

> "He bought a Lincoln in '46 and remember how hard cars were to get; and a Cadillac in '47. Remember how hard it was to get the cars in those days? Took a little under-the-table dealings, if my memory serves me correctly. I didn't have one." (R. 885).

This unjustifiable argument had the calculated intent to arouse the envy and prejudice of the Jury against the more fortunate; and the purpose of implying criminal under-the-table violations of Emergency price and quota regulations, with no basis whatsoever in the evidence.

c. The Prosecutor by repetitious cross-examination established that the defendant was uncertain of the time during which Blaz Lucas was Deputy Prosecutor in Lake County (R. 786-788).

Mr. Brown's argument to the Jury on this follows:

> "Now, we come to Blaz Lucas. You remember the Defendant on Blaz Lucas. Well, you know it would be hard for a normal fellow to think back and remember that many years back; but, gentlemen, when you are in the kind of business the Defendant was in, you know who the prosecutor is and who the deputy prosecutor is. If you are running a farm, you don't care; and it is interesting to observe he could not be sure about who this assistant prosecutor was. He was sure about the term of office of the sheriff and the chief of police; he was not sure about Blaz. Now Blaz he used as a nominee in connection with that corporation and he just didn't want to be saying anything. By George, I know Blaz Lucas, his attorney, was the fellow-chief deputy prosecutor—when those locations for the Novelty machines were increasing. I am talking about these things to give you a background picture, because in the 103 and 108 we are just charging him with a percentage in regard to the Novelty and News Company." (R. 884-885).

d. Immediately thereafter the Prosecutor said to the Jury:

> "Now, the Defense had one good witness, in my opinion, and that was the funeral director; and even though he said the Defendant was a law-abiding citizen, when asked by counsel, he said, 'They operate a lot different in Gary than down here.'" (R. 885).

These obviously inflammatory appeals to prejudice against the defendant were calculated to induce the Jury to regard the defendant as a corrupter of Lake County, Indiana, morals and to consider him as a bad man from an alien community of wrong ideals. It was a purposeful diversion of the Jury's interest from the merits of the case.

Nowhere in the record (R. 665-7) is the quotation credited to Mr. Burns, the funeral director, by the Prose-

cutor. The reckless creation of this "quotation" (R. 885) was a wilful distortion of evidence for the obvious purpose of inciting local prejudice of the Jury against the defendant, a resident of Gary, on trial in another judicial district.

e. The Prosecutor's persistent efforts to inject irrelevant prejudicial matters into the record cannot be overlooked. This was done by asking questions, which were so phrased as to state the prejudicial matters in the presence of the Jury, when it was obvious that some would bring forth objections to which they were subject. The mere sustaining of objections on these occasions, with no warning to desist, reprimand, or caution and instruction to the Jury did not cure the irreparable damage to the defendant.

The bases for arousing prejudicial conjecture on these matters by the Jury, were established, and no substantial effort was made to erase them from the Jury's minds, if indeed, that could be done. The following are instances of this conduct:

1. There is no proof in the record of any payments by the defendant or any other person to any law enforcement officials. This matter did not become an issue in the case, in any fashion other than by the Prosecutor's calculated innuendo. In the course of direct examination of Agent Schreiber, the Prosecutor asked the following question:

> "Q. In your examination of the records turned over to you by the defendant, did they disclose any payments that were made to the city police, County sheriff, or any other law enforcement or public officials?"

This question brought forth an objection by defendant's counsel to which the Prosecutor replied, by argu-

ment. The Court sustained the objection on the ground that the question was leading. (R. 412-413).

In the cross-examination of William H. Crawford, a witness for the defendant, who testified after the Government had completed presentation of all of its evidence, *without proving any such payments,* the Prosecutor asked,

> "Q. (By Mr. Brown) Did you make any political contributions in connection with the operation of the Novelty Company?"
> "A. No, Sir."
> "Q. (By Mr. Brown) Make any payoffs to public officials?"
> "A. No, Sir."
> "Q. Make any payoffs to law enforcement officials?"
> "A. No, Sir." (R. 823).

The argument by Mr. Whitcomb at page 860 of the Record, dwelt upon the corruption of law enforcement officers, political officers and juvenile delinquency. It is submitted that Mr. Brown's argument concerning Blaz Lucas, at page 885 of the Record, was intended to imply corruption by bribery of a public officer.

All of this charged, without any support in the Record of evidence, that the defendant was guilty of another collateral crime. It could only be intended prejudice to a fair consideration of the defendant's trial upon the offenses charged in the two counts of the indictment.

2. At page 780 of the Record, in cross-examination of the defendant, John J. Doyle, the Prosecutor asked,

> "Q. Now, did you ever work as a miss-out man in a crap game?"
> "A. No, Sir, I did not."
> "Q. You were never so employed at any time in your life?"
> "A. No."

This question, without any foundation, and without any explanation in the Record, invited speculation by the Jury as to the character of such a sinister sounding employment, and as to the reason for the Prosecutor's question.

At page 803 of the Record, the Prosecutor was shown to have asked the following question of the defendant on cross-examination,

> "Q. Incidentally, when were were talking about your payment of money to Sonny Sheets, do you know whether or not in the late Twenties, Sheets was operating a gambling casino at Cicero or not?"

Objection to this question was sustained, but it is submitted that the obvious attempt to link the defendant by knowledge, with some irrelevant activity of another person 25 years before trial, was for the purpose of arousing prejudicial conjecture and speculation by the jury on a matter not related to the charges in the indictment.

3. In the examination of Mrs. Virginia O'Donnell (R. 248-258), who testified concerning gifts to her by the defendant and his wife during the years in question, the Prosecutor asked whether her former husband, Larry Finerty, had died from natural causes (R. 255). Objection to this question was sustained. It is obvious that the Prosecutor did not anticipate an affirmative answer to this question and was hopeful of introducing to the Jury possible evidence that Mr. Finerty had died as the victim of violence. Possible knowledge of the events connected with the death of Mr. Finerty, on the part of members of the Jury, would, of course, be revived and refreshed by this question.

Of course, this matter had no relevancy to the defendant or to the charges on trial, and it is submitted that

the question was asked for the purpose of arousing prejudicial conjecture and speculation by the Jury.

All of this conduct is subject to as vivid a description as that given by the Third Circuit Court of Appeals to the prosecutor's activities in *United States* v. *American Die and Instrument Works,* 213 F. 2d 731. This decision reversed an income tax conviction which it held to be supported by substantial evidence. The Fifth Circuit Court of Appeals in *Steele* v. *United States,* 222 F. 2nd 628 at 631 has also reversed for incorrect and unfair argument even though not objected to, because of the trial court's responsibility to admonish for such conduct, of his own motion.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11528. OCTOBER TERM, 1955, APRIL SESSION, 1956.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN J. DOYLE,
Defendant-Appellant.

Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

May 23, 1956.

Before FINNEGAN, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

LINDLEY, *Circuit Judge.* On August 30, 1954, a grand jury returned an indictment against defendant in two counts, the first of which charged defendant with having willfully attempted to defeat and evade a large part of income tax due and owing by him and his wife for the year 1947 by filing a joint return for that year showing a tax liability of $38,770.01, whereas, it was averred, the defendant knew that the amount due was $59,812.73, more or less, all in violation of the Internal Revenue Code, Title 26, U. S. C. § 145 (b), and the second of which charged the same offense for the year 1948, alleging that, whereas the tax return showed due $58,317.24, defendant knew that the true amount was $76,410.86, more or less. After a trial ex-